

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653(KRH)
.
.
CIRCUIT CITY STORES, .
INC., . 701 East Broad Street
.
Richmond, VA 23219
.
Debtor. . July 22, 2010
. 10:06 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

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1 COURT CLERK: All rise. United States Bankruptcy
2 Court for the Eastern District of Virginia is now in session.
3 The Honorable Kevin R. Huennekens is presiding. Please be
4 seated and come to order.

5 COURTROOM DEPUTY: In the matter of Circuit City
6 Stores, Incorporated, hearing on Items 1 through 46 as set out
7 on debtor's proposed agenda.

8 MR. FOLEY: Good morning, Your Honor. Doug Foley
9 with McGuire Woods on behalf of the debtors. Also with me from
10 my firm is Sarah Boehm. With me at counsel table is Gregg
11 Galardi and Ian Fredericks from Skadden Arps. From the company
12 today, Your Honor, is Kay Bradshaw who's vice president and
13 controller, and Jeff McDonald who is vice president and
14 treasurer of the company.

15 Your Honor, we have 45 items on the agenda, but we
16 only have a couple matters that will need the Court's attention
17 this morning. And the -- we've made a lot of progress to
18 report to the Court on a variety of matters. Just to take the
19 matters in order on the agenda, if the Court please. Matter
20 Number 1 and 2, this is the Motorola 503(b)(9) claim as well as
21 the General Instruments' 503(b)(9) claim motion.

22 We're pleased to report to the Court that we have
23 finally been able to resolve those matters. We filed a
24 stipulation documenting the settlement. The deadline to object
25 is the 27th of July after which time the settlement will be

1 finalized. We don't anticipate any objections.

2 Item Number 3, Your Honor, is the Towne Square late
3 claim motion. We've also settled and filed a stipulation with
4 respect to that motion. It can be removed from the docket.
5 Item Number 4, Your Honor, is a carryover from our last
6 hearing. This is -- was our motion to pay certain
7 administrative claims. We are withdrawing that motion without
8 prejudice at this time.

9 THE COURT: Oh, all right.

10 MR. FOLEY: Item Numbers 5 and 6, Your Honor, these
11 are the Madcow motions, one for an admin claim and one for a
12 503(b)(9) claim. I'm pleased to report to the Court we finally
13 settled those, as well. We filed a documented stipulation.
14 The time period to object to that expires on August 4th and we
15 don't anticipate any objections.

16 THE COURT: Okay.

17 MR. FOLEY: Item Number 7, Your Honor, is the motion
18 by Site A to allow a late file claim. We're exchanging
19 documents and information with their counsel, Mr. Campson, and
20 are going to try to see if we can't reach a resolution, but
21 they've requested and we've agreed to adjourn their motion
22 until the August 31st hearing date.

23 THE COURT: All right. Do you -- is that going to be
24 a status that day or are we going to go forward with that?

25 MR. FOLEY: We anticipate that will be a status, Your

1 Honor, because we're -- we think we'll be able to resolve it
2 and -- prior to that date.

3 THE COURT: All right. Very good.

4 MR. FOLEY: Item Number 8, this is our objection to
5 the New York State Department of Tax claim. We're in the
6 process of documenting a settlement with respect to that
7 objection, so we would ask for a short adjournment of our
8 objection until the August 4th hearing date.

9 THE COURT: All right.

10 MR. FOLEY: Item Number 9, Your Honor, is a new
11 motion filed by Metra Electronics for a late file claim. We're
12 beginning to work with them on trying to resolve that, but we
13 would ask that that matter be adjourned until the August 31st
14 hearing date.

15 THE COURT: It will be.

16 MR. FOLEY: Item Number 10 and 11, Your Honor. Item
17 Number 10 is our objection to Quebecor World (USA)'s claim.
18 And Item Number 11 which we show was adjourned, but I'd like
19 the Court to take that out because I don't believe there's any
20 objections to it. It is our motion to seal certain exhibits at
21 the request of Quebecor.

22 Quebecor has asked to have their matter adjourned
23 until the August 4th hearing date pending the resolution of the
24 matter that will go forward today which is Graphic
25 Communications. They're very similar issues. And so, in order

1 to save time, cost and money we've agreed to adjourn Item
2 Number 10 until the August 4th hearing date. But, with respect
3 to Item Number 11, which is the motion to seal certain
4 exhibits, we would ask the Court to grant that motion. There's
5 been no objections.

6 THE COURT: Do I have copies of those exhibits at
7 this point?

8 MR. FOLEY: I believe we have submitted them. If we
9 haven't we can certainly have that provided to chambers today.

10 THE COURT: All right. Well, I just wanted to know
11 where they physically were. I certainly will seal them --

12 MR. FOLEY: Okay.

13 THE COURT: -- and grant your motion.

14 MR. FOLEY: All right. Thank you, Your Honor. Items
15 Number 12 we could pass over. Item Number 12 actually is a
16 similar motion with respect to Graphic Communications to seal
17 their exhibits. We would ask the Court to grant that, as well.

18 THE COURT: All right. And obviously I have those
19 and they will be sealed.

20 MR. REPCZYNSKI: Your Honor, Thomas Repczynski on
21 behalf of Graphic. We have no objection and we'd ask that
22 those be sealed.

23 THE COURT: All right.

24 MR. FOLEY: Your Honor, Item Number 13 is our motion
25 to extend the time to remove certain actions under 2080 U.S.C.

1 1452 and Federal Rule of Bankruptcy Procedure 9027. The motion
2 is not been objected to. It request similar relief as we've
3 sought in the past to extend that deadline until October 4th or
4 30 days after an order is entered granting motion for relief
5 from the automatic stay.

6 THE COURT: Okay. That'll be granted.

7 MR. FOLEY: Your Honor, if we could pass over Item
8 Number 14 for the moment. This is the fifth omnibus objection
9 and -- in which the Graphic Communications claim objection will
10 be addressed.

11 THE COURT: All right.

12 MR. FOLEY: If we could pass over for the moment
13 Items Number 15 through 39. Ms. Boehm will be addressing those
14 shortly.

15 THE COURT: Okay.

16 MR. FOLEY: Item Number 40. This is our adversary
17 proceeding against USDR and Signature. We have been working
18 with Mr. Epps and counsel for Signature who is the party that
19 was in default and has a motion -- we have a motion to default
20 them to try to resolve this consensually. We are very close to
21 a settlement. In fact, we may have -- we may reach a
22 settlement this morning. I was talking to Mr. Epps last night,
23 so we think we are very close. We're just waiting to hear back
24 from their client. So, we would ask that this matter be
25 adjourned until the August 4th hearing date, Your Honor, so

1 that we can hopefully document it before we have to address the
2 default motion.

3 THE COURT: All right.

4 THE COURT: Item Number 41, Your Honor. Counsel is
5 here for Mitsubishi and this is the pretrial conference with
6 respect to our complaint. What we need to do, Your Honor, is
7 pick a trial date six months out or so. We think that the
8 trial will be no more than a one-day trial at this point. We
9 also need to schedule, however, the motion to dismiss Count 6
10 of the complaint which we'd like to set for the August 23rd
11 hearing date. And as far as calendar goes, we'll obviously
12 defer to the Court as to when the Court has a day available.
13 Probably in January is what we're thinking.

14 THE COURT: All right. Very good. Mr. Baxa.

15 MR. BAXA: Good morning, Your Honor. It's Phil Baxa,
16 local counsel for Mitsubishi and for the Insurance Company of
17 the State of Pennsylvania which is a co-defendant. And I have
18 John Isbell here from the King & Spalding firm who is lead
19 counsel for Mitsubishi. Also on the phone I believe is a
20 gentleman named Lon Seidman who is counsel for the insurance
21 company, as well.

22 THE COURT: Good morning, Mr. Isbell.

23 MR. ISBELL: Good morning, Your Honor. Mr. Foley and
24 I spoke this morning and we've reached agreement with the
25 August 23rd date for the motion to dismiss. I also understand

1 that the debtor anticipates filing a motion for summary
2 judgment as to one of the affirmative defenses shortly and that
3 would also be set for the same date. And that is agreeable
4 with us, as well. On trial dates, we were talking about that,
5 and I believe that a February trial date would actually work
6 best for us. If the Court has time in February that would be
7 ideal, I believe.

8 MR. FOLEY: We have no objection to that, Your Honor.
9 And I did fail to mention the motion for partial summary
10 judgment that we intend to file and have heard on the August
11 23rd hearing date will address the affirmative defense of
12 503(b)(9) claims and whether or not that can be used for new
13 value defense or a preference action.

14 And so, it's a very narrow legal issue. But, we
15 think that would go a long way to getting things resolved. And
16 we've also discussed the possibility in any event potentially
17 mediating this one prior to the trial date. So, we have no
18 problem with a February trial date, Your Honor.

19 THE COURT: All right. Very good. Okay. The Court
20 was looking at February 7 and 8. How many days do you need to
21 try this, just one?

22 MR. ISBELL: We believe one day, Your Honor.

23 THE COURT: Okay. Well, how about February 8 then?

24 MR. FOLEY: That's fine with the debtors, Your Honor.

25 THE COURT: Okay.

1 MR. ISBELL: That works, Your Honor. And the -- we
2 have made significant progress in the last couple of months of
3 reconciling the claims, Your Honor, all the (indiscernible).
4 So, we think that when we get to trial, if a trial is
5 necessary, we're hopeful that either a settlement, and once the
6 parties or a mediation will result in a settlement, but if we
7 get the trial we anticipate that the -- probably the only
8 witnesses, but that would be called would be expert witnesses
9 on preference defenses.

10 THE COURT: All right. Very good. The -- if you do
11 decide to mediate it do it well in advance so that we don't
12 lose the trial date because the Court's not inclined to extend
13 the trial date. I will issue my normal pretrial order.

14 MR. FOLEY: That's fine, Your Honor. Thank you.

15 THE COURT: Fine.

16 MR. ISBELL: Thank you, Your Honor.

17 THE COURT: We'll hear the motions on the 23rd.

18 MR. FOLEY: Okay. Thank you, Your Honor.

19 MR. ISBELL: Thank you.

20 MR. FOLEY: Now, Items Number 42 and 43 on the docket
21 is the complaint by Ryan and our motion to dismiss the
22 complaint without prejudice that the Court heard last time. I
23 believe counsel is on the phone. The Court recalls raising
24 concern about the rightness of the complaint. And at the
25 conclusion of the last hearing we discussed the possibility of

1 including some language and any plan confirmation order that
2 would preserve Ryan's right to argue the ownership question of
3 if and when any refund is -- materializes that they have an
4 ownership interest in that race.

5 And we've proposed language that would state, and
6 I'll read it into the record, that "Notwithstanding anything
7 contained herein to the contrary," this would be in the
8 confirmation order, "subject to any subsequent order of the
9 Court the transfer and conveyance of all assets of each of the
10 debtors and the estates to the liquidating trust on the
11 effective date shall be without prejudice to the rights of Ryan
12 to seek determination that it owns or possesses an interest or
13 portion thereof in certain contingent assets only if and after
14 they become assets and the right for such determination shall
15 be and hereby is preserved in its entirety and jurisdiction of
16 such termination is specifically retained by the bankruptcy
17 court."

18 We proposed that language to counsel for Ryan to
19 satisfy that concern that they raised and the Court raised at
20 the last hearing. Apparently that's unacceptable to them at
21 this point, but -- and so, we intend to put that language in
22 the confirmation order no matter what. At this point I think
23 both parties would simply ask the Court to make a ruling on the
24 motion to dismiss.

25 THE COURT: All right. Is there --

1 MR. MARINO: Good morning, Your Honor. Robert Marino
2 appearing on behalf of Ryan, Inc. And with me also on the
3 telephone is Bruce W. Akerly of the law firm of Cantey Hanger
4 who is also -- who had previously been admitted pro hac vice.
5 We both very much appreciate the Court's accommodating us to
6 participate telephonically. I'll defer to Mr. Akerly.

7 THE COURT: Okay. Mr. Akerly, you wish to address
8 the Court?

9 MR. AKERLY: Good morning, Your Honor. I think Mr.
10 Foley has accurately stated the status, but I will let the
11 Court know that we have not commented on his language. If you
12 will recall, and my recollection is after the last hearing that
13 was on last Monday that we agreed to go back to the clients to
14 determine if the clients would be amenable to placing language
15 in a plan or otherwise that would essentially preserve the
16 ownership issue for a later date.

17 My client after discussing it with them determined
18 that they were not amenable to that process and would like the
19 Court to rule on the motion to dismiss. And I think -- I
20 believe I sent a letter to chambers to that effect, Your Honor,
21 so I believe the only thing before the Court now at this time
22 would be the ruling -- the necessary ruling on the motion to
23 dismiss.

24 THE COURT: All right. Thank you, Mr. Akerly. And
25 the Court obviously is very familiar with this matter. I've

1 read all of the papers in this case. I did receive your
2 subsequent correspondence, Mr. Akerly. The Court is prepared
3 to rule.

4 The ruling of the Court is, I'm going to dismiss the
5 complaint for a lack of ripeness. I don't think that it's ripe
6 for the Court to address at this time. My concern at the last
7 hearing was the preservation of the claim so that it
8 wouldn't -- the issue wouldn't be precluded as a result of plan
9 confirmation.

10 I am comfortable with the language that's been
11 proposed by the debtor that they say that they're going to
12 insert into the plan that it will preserve any claim that Ryan
13 might have in the future if it ever does become ripe. And so,
14 with that, that'll be the Court's ruling and, Mr. Foley, I'd
15 ask you to please present an order to the Court for its
16 consideration to that effect.

17 MR. AKERLY: If I may, Your Honor. I appreciate the
18 Court's ruling. We have not had an opportunity to weigh in on
19 that language. Have not weighed in on it. And I just want to
20 make sure that I understand that that language is planned to be
21 put in a confirmation order as opposed to the plan of
22 reorganization, is that correct? My point is, at some point I
23 would like an opportunity to object to the language that's
24 being proposed and/or ask that it be modified, you know, in
25 some respects for my -- to protect my client's rights.

1 THE COURT: Okay. Mr. Akerly, that oral motion is
2 overruled. The Court is satisfied with the language that was
3 presented to the Court this morning. The Court's made its
4 ruling, and so that's going to be the determination made by the
5 Court.

6 MR. AKERLY: Thank you, Your Honor.

7 THE COURT: You're welcome.

8 MR. FOLEY: Thank you, Your Honor. We'll submit a
9 proposed order for the Court's consideration. The other items
10 on the agenda, Your Honor, Ms. Boehm will address, Items 15
11 through 39, and Mr. Galardi will address Items Number 14 which
12 is the Graphic Communication's matter, as well as the Items 44
13 and 45 which is the update with respect to the plan and the
14 mediation that we conducted.

15 THE COURT: All right. Thank you.

16 MR. MARINO: Excuse me, Your Honor. May we be
17 excused from the hearing?

18 THE COURT: Yes, you may, Mr. Marino. Thank you.

19 MS. BOEHM: Good morning, Your Honor. Sarah Boehm on
20 behalf of the debtors. Item 14 on the agenda is the debtor's
21 fifth omnibus objection. We only have one remaining claim in
22 omni five and that is Graphic Communications, Inc. And Mr.
23 Galardi will be addressing the substantive argument which will
24 drop down to the end for the contested matters.

25 THE COURT: All right. That would be appropriate.

1 MS. BOEHM: Item 15 is the debtor's seventh omnibus
2 objection to certain late claims. We have noticed a hearing to
3 go forward on the merits with respect to Mr. Dino Bazdar, so
4 we'll drop that matter to the end of the docket for a contested
5 hearing. And the other remaining -- one other remaining
6 claimant in omni seven we'll ask the Court to adjourn for
7 status on August 4th at 2 p.m.

8 THE COURT: What's the remaining claimant?

9 MS. BOEHM: Mr. (indiscernible).

10 THE COURT: Okay. Very good.

11 MS. BOEHM: Item 16 is the debtor's eighth omnibus
12 objection to late claims. We have three claims remaining in
13 that and we would ask the Court to adjourn that for status on
14 August 23rd at 2 p.m.

15 THE COURT: It'll be adjourned.

16 MS. BOEHM: Item 17 is the ninth omnibus objection to
17 the late claims. We have notices for a hearing on the merits
18 with respect to Mr. Lyle Epps. And we will drop that to the
19 end for a contested hearing and ask that the remaining
20 claimants be adjourned for status on August 23rd.

21 THE COURT: Okay. Adjourned to the 23rd.

22 MS. BOEHM: Item 18 is the nineteenth omnibus
23 objection. Mr. Foley referenced earlier the Motorola and
24 General Instrument stipulation that was filed resolved several
25 claims in omni 19. The deadline to object to that stipulation

1 has not yet run and the other three remaining claims we ask to
2 adjourn to August 23rd at two o'clock.

3 THE COURT: That'll be adjourned to the 23rd.

4 MS. BOEHM: Items 19, 20, 21 and 22 are the debtor's
5 twentieth omnibus, twenty-second omnibus, twenty-third omnibus,
6 and the thirtieth omnibus. We ask that all of those remaining
7 claimants be adjourned for status to August 23rd at two
8 o'clock.

9 THE COURT: That'll be adjourned to the 23rd.

10 MS. BOEHM: Item 22 -- oh, we did that. Item 22 was
11 the thirtieth. Item 23 is the thirty-first omnibus objection.
12 That includes PNY Technologies which is proceeding in
13 accordance with a scheduling order and the adversary
14 proceeding. And the remaining claimants we would ask to be
15 adjourned to August 23rd.

16 THE COURT: All right.

17 MS. BOEHM: The debtors --

18 THE COURT: Have we set the PNY Technologies
19 adversary proceeding for trial at this point?

20 MS. BOEHM: We have.

21 THE COURT: All right. Thank you.

22 MS. BOEHM: Item 24 is the thirty-third omnibus
23 objection. We recently filed a stipulation with Lexmark
24 International resolving their claims. And there is one
25 remaining claimant that we would ask to adjourn to August 23rd

1 at two o'clock.

2 THE COURT: And which claimant is that?

3 MS. BOEHM: Sensormatic Electronic Corp.

4 THE COURT: Thank you.

5 MS. BOEHM: Item 25 is the thirty-fourth omnibus
6 objection. That also included Motorola and General Instrument,
7 and assuming there are no objections their claims will be
8 resolved. Audiovox is the one remaining claimant in that
9 objection and we would ask that that matter be adjourned to
10 August 23rd.

11 THE COURT: Okay. The Audiovox will be adjourned to
12 the 23rd.

13 MS. BOEHM: Item 26 is the thirty-sixth omnibus
14 objection. We would ask that all of those be adjourned to
15 August 23rd.

16 THE COURT: Be adjourned to the 23rd.

17 MS. BOEHM: Item 27 is the thirty-seventh omnibus
18 objection to the PAX claims. We have recently filed
19 stipulations with Kitsap County, the City of Chesapeake, and
20 Escambia County. And for some of those the objection deadline
21 has run. Escambia County runs tomorrow. For all other claims
22 we would ask that they be adjourned to August 23rd.

23 THE COURT: Those will be adjourned to the 23rd.

24 MS. BOEHM: Item 28 is the forty-third omnibus
25 objection. There are only two claimants remaining in that

1 objection. The claim of Rusty Santangelo (phonetic) has been
2 resolved. There were no objections and that deadline has run.
3 We had noticed a hearing on the merits with respect to the
4 Tennessee Department of Treasury, however, they requested a
5 brief adjournment and we have agreed to adjourn that to August
6 4th at two o'clock.

7 THE COURT: August 4th. All right.

8 MS. BOEHM: And that's for a hearing on the merits.

9 THE COURT: Okay.

10 MS. BOEHM: Item 29 is the forty-fourth omnibus
11 objection. This also included Motorola and General Instrument.
12 If no objections are received by the 27th those will -- then
13 those objection will be fully resolved.

14 THE COURT: All right.

15 MS. BOEHM: Item 30 is the debtor's forty-ninth
16 omnibus. Item 31 is the debtor's fiftieth omnibus. We would
17 ask that all the claims in those be adjourned to August 23rd.

18 THE COURT: All right.

19 MS. BOEHM: Item 32 is the fifty-fourth omnibus
20 objection. This had one remaining claimant, Mr. Gregg Nagi
21 (phonetic). We have filed a stipulation resolving that
22 objection and the objection deadline runs tomorrow. If there
23 are no objections then this objection will be fully resolved.

24 THE COURT: All right. Very good.

25 MS. BOEHM: Item 33 is the sixtieth omnibus. We

1 would ask that all of those remaining claimants be adjourned to
2 August 23rd.

3 THE COURT: All right.

4 MS. BOEHM: Item 34 is the seventieth omnibus
5 objection. We have filed a stipulation with Universal Display
6 and Fixtures. The objection deadline runs tomorrow. If there
7 are no objections that Universal will be resolved. And for the
8 remaining claimants we would ask to be adjourned to August
9 23rd.

10 THE COURT: All right.

11 MS. BOEHM: Item 35 is the seventy-second omnibus
12 objection and we have submitted a supplemental order that has
13 previously been entered by the Court that fully resolve this
14 objection.

15 THE COURT: All right.

16 MS. BOEHM: Item 36 is the seventy-fourth omnibus
17 objection and we would ask that all of those matters be
18 adjourned to August 23rd.

19 THE COURT: All right.

20 MS. BOEHM: Item 37 is the seventy-sixth omnibus
21 objection. There are three claims remaining that we would ask
22 to be adjourned to August 23rd. And Item 38 is the
23 seventy-eighth omnibus objection and which has two remaining
24 claimants, so we would ask to be adjourned to August 23rd.

25 THE COURT: All right.

1 MS. BOEHM: Item 39 is the debtor's seventy-ninth
2 omnibus objection that seeks the disallowance of certain legal
3 claims. This is on for status for the first time. This
4 objection included 165 claims for approximately \$56 million.
5 We did receive approximately 20 responses that are set forth on
6 Exhibit A. We would ask the Court to disallow any claims for
7 which no response was received, and for any claimant who did
8 file a response we will adjourn this for status to the August
9 23rd hearing.

10 THE COURT: All right. That will be granted.

11 MS. BOEHM: Thank you. And that concludes the
12 general omnibus objection matters. We do have omni 5, 7 and 9
13 with hearings going forward on the merits after the
14 confirmation status update.

15 THE COURT: Okay.

16 MS. BOEHM: Thank you.

17 THE COURT: It sounds like you're making good
18 progress.

19 MS. BOEHM: Thank you, Your Honor.

20 MR. GALARDI: Your Honor, first on the confirmation
21 update. As Your Honor knows and scheduled mediation for last
22 week, the parties met in Norfolk for two days with Judge
23 Santoro. I know Your Honor has already heard this but for the
24 public record. We are pleased to announce that we had mediated
25 our way to an agreement regarding the plan of reorganization

1 between the committee, and so we will be proceeding with the
2 joint plan.

3 Your Honor, just to go back to one of the matters as
4 part of that, the administrative motion that we filed as Your
5 Honor may recall, we were not allowed to withdraw that without
6 committee consent. I don't know if that was clear, but the
7 committee has consented that was one of the things that we, in
8 fact, resolved after we resolved the plan.

9 THE COURT: I noticed Ms. Tavenner didn't jump up
10 when you --

11 MR. GALARDI: I was hoping she would, but yes, it was
12 with their consent, so she didn't jump up -- I thought she
13 would jump up and say, yes, we've agreed to withdraw it. You
14 were concerned that she would -- you can't do that, but we
15 have, so to speak, kissed and made up on this. With respect to
16 the joint plan, Your Honor, I believe that you have been
17 provided separately with the terms of the agreement for
18 mediation.

19 THE COURT: I have.

20 MR. GALARDI: We've agreed with the committee not to
21 go into details, but suffice it to say that, (1) we are in the
22 process and today's a delivery date that we would be revising
23 various documents and deliver them to the committee. They will
24 have a period to respond and to look at those comments. And
25 then we have a period to revise those.

1 The idea is hopefully and subject to Your Honor's
2 calendar to have a confirmation hearing scheduled at the first
3 day Your Honor is available after September 6th. I think that
4 poses an interesting question for Your Honor because I think we
5 have an omnibus scheduled for September 8th. It begins at two.

6 THE COURT: You do?

7 MR. GALARDI: And also one later in the month. The
8 day escapes me right now. Again, scheduled at two.

9 THE COURT: It's on the 27th I believe.

10 MR. GALARDI: Your Honor, again, first available is
11 the 8th. I don't know if Your Honor wants the full hearing on
12 that date or whether we wanted to schedule a separate date or
13 whether we wanted to put it to the end of September. That's
14 the first question for Your Honor's scheduling.

15 Your Honor, also, just as it dawned on me, and the
16 September 8th is fine by us if that's available to Your Honor.
17 One of the issues and Your Honor may have seen it in the
18 stipulation is, there's going to be some -- I mean, since it's
19 been a year since the disclosure statement has been out there
20 we're going to update some numbers.

21 The debtors and the committee don't believe that that
22 requires a re-solicitation, but we are going to do that. I
23 would hope that that would be on file the first week of August,
24 but after -- perhaps after our first hearing in August -- we
25 could proceed, and again this goes to Your Honor. If Your

1 Honor had concerns we're going to take the position that no
2 re-solicitation is required.

3 We think all of the information, though helpful and
4 useful, actually is very favorable to all of the creditors, and
5 so there's not a material downgrading of anybody's recovery,
6 indeed it's an upgrading of recoveries, and our idea is to get
7 that on, let's just say for the sake of argument, by August
8 15th. That may influence Your Honor which September date.

9 Again, I have no objection to September 8th date, but
10 it may influence Your Honor how long you want that statement on
11 file and go to a confirmation hearing. Again, we don't think
12 it's a material modification. We will make that argument
13 either in a separate hearing if Your Honor wants it before we
14 go to confirmation or at the time of the confirmation. I just
15 lay that out for Your Honor.

16 And I haven't discussed that with the committee. It
17 just dawned on me this morning. So, I think Mr. Feinstein or
18 Mr. Pomerantz may be on the call or Lynn can be on it. But, I
19 put that for one of the things for Your Honor to consider
20 because I do think those documents should be on file no later
21 than August 15th which to me gives plenty of time for
22 September 6th, so we can make the argument and take the risk,
23 or I leave it to Your Honor.

24 The other thing about that stipulation, Your Honor,
25 is -- I'm sorry, one more thing. You jumped up that time.

1 Again, the stipulation still reserves jurisdiction for Judge
2 Santoro to go to mediation so that certain developments such as
3 the Canadian tax ruling still be in abeyance. We're still
4 hoping any day now to get the revised ruling which would not
5 slow down confirmation, but that is just one other aspect of
6 this that could throw off the timing. But, I don't think it
7 should change Your Honor's view of scheduling the confirmation
8 hearing for the earliest date that Your Honor is comfortable
9 with. Now I'll turn it over to --

10 MR. POMERANTZ: Your Honor, it's Jeff Pomerantz. I'm
11 on the phone. May I respond?

12 THE COURT: Yes, you may. I learned yesterday, Mr.
13 Pomerantz, there are actually two Mr. Pomerantzs in your firm
14 who are unrelated to each other which I took -- well, it came
15 to some surprise, but in any event, it's good to hear from you.

16 MR. POMERANTZ: There actually are, and there are
17 several Pomerantzs on the west coast which there weren't in the
18 east coast when I lived there, but that is correct.

19 Your Honor, I agree what Mr. Galardi says with a
20 couple of qualifications, (1) the material that is to be filed
21 with respect to an updated disclosure issues and an updated
22 plan per the mediation statement is to be filed by August 9th.
23 We fully expect to be able to make that. Such to the extent
24 Your Honor has any concerns with notice in terms of scheduling
25 a confirmation hearing we would, if Your Honor's available on

1 the 8th and thinks we can do it then, we would prefer to have
2 it on September 8th rather than September 27th or alternatively
3 some date in between. We would rather not go another three
4 plus weeks because as Your Honor knows the committee has been
5 anxious to get the confirmation.

6 With respect to Mr. Galardi's comments about the
7 mediators getting involved, that is true, and we have potential
8 for needing to go back to mediation, but I just wanted to
9 apprise the Court of. As Your Honor knows we've been waiting
10 for the Canadian revenue ruling, and as Mr. Galardi said, we
11 hope that that will come within the next several days and will
12 be positive.

13 If it does not come in the next several weeks or if
14 for some reason it does not come back favorable we may have
15 issues on how to proceed and we may have to go back to
16 mediation. So, while we are hopeful that that's not the case
17 we wanted to apprise Your Honor of that so if in a few weeks we
18 come back to you and say that there are disputes that have to
19 be mediated Your Honor won't be surprised.

20 THE COURT: All right. Thank you.

21 MR. POMERANTZ: But, other than that the mediation
22 was successful. We think we've resolved the issues. We're
23 looking forward to receiving the documents and we're very
24 hopeful that we could proceed with a confirmed -- a
25 confirmation hearing in early September.

1 THE COURT: All right. What the Court's preference
2 is is that I would like to see Mr. Galardi, Mr. Fredericks, Mr.
3 Foley, Ms. Tavenner, Mr. Van Arsdale. And if you can phone
4 back in when we're done with this hearing in chambers because
5 the Court does have some questions that I'd just like to ask
6 and I'd like to do it in that fashion.

7 MS. TAVENNER: Certainly.

8 MR. POMERANTZ: I've available, Your Honor.

9 UNIDENTIFIED ATTORNEY: That's fine with us, Your
10 Honor.

11 THE COURT: All right.

12 MR. GALARDI: Your Honor, that then takes care of all
13 matters, I think it was 44 to 48 at the end of the agenda,
14 which now going back to claims objection so that I -- handling
15 one which is matter 14 on the agenda.

16 THE COURT: Right.

17 MR. GALARDI: So, I will -- I think it's -- I'll move
18 to that one and then we can go back to the others that are
19 still remaining. All right. Your Honor, matter 14 on the
20 agenda was the debtor's objection to the claim 1053 of Graphic
21 Communications.

22 Your Honor, papers have been submitted with respect
23 to this claim and there's a stipulation of facts that Your
24 Honor has before you. There is also a -- in addition to the
25 objection we had a supplemental objection, an answer to that

1 essentially, and a reply to that. If Your Honor -- I would
2 just proceed on oral argument with respect to those matters and
3 let the gentleman respond to that and seek a reply.

4 THE COURT: All right. You may proceed as you
5 desire.

6 MR. GALARDI: Your Honor, as I think our papers make
7 clear we see two basic legal issues; the need to resolve based
8 on the statement of facts. The first issue is whether this is
9 a contract for goods or services. Your Honor's previously
10 ruled that the predominant purpose should be used there. And
11 with respect to the predominant purpose I think the parties
12 agree that it's really a three-part approach and it's just a
13 matter of how Your Honor looks at that contract vis-a-vis
14 that -- those factors.

15 With respect to those factors, Your Honor, the
16 three-prong approach is that you look to the language of the
17 contract itself, the nature of the business, and then the
18 intrinsic worth of the materials that are supplied pursuant to
19 that contract. Your Honor, our view is that the predominant
20 purpose of this contract is clearly one for services and that
21 any goods were incidental to that.

22 With respect to that Your Honor has before you I
23 think four documents with respect to the contract, so I'd like
24 to take the first prong up first. Some of this is highlighted
25 in the stipulation of facts, some I will -- I would just like

1 to walk through.

2 The first document is the master services agreement
3 that is between Circuit City and Graphic Communications. Your
4 Honor, this agreement governs as Your Honor knows, the master
5 service agreement and what we call SOW 1, 2 and 3 which is the
6 Statements of Work pursuant to which Graphic is seeking its
7 claim. And first, just to take a very superficial look at the
8 contract, the first thing that points out is the purpose of the
9 contract says as we've highlighted in 1.1 that a supplier will
10 provide services with a capital S. So, we think that's one
11 point in our favor with respect to this.

12 And I point out for later that 2.2 of that section
13 says, "To the extent anything may conflict later on this
14 contract governs." I would also point to Your Honor the
15 definition section in that same master agreement which is
16 Section 3.0, definitions of deliverables. When you look at
17 this deliverables, Your Honor, it's interesting to see that the
18 supplier deliverables and the supplier being Graphic are broken
19 into two things; any items or work. It never uses the word
20 goods here. It uses items or work.

21 And importantly, then, if you look at Section 3.3 in
22 the definitions, it doesn't include items. It says, "Any
23 reasonable effort extended by the party or their personnel to
24 perform the work described in SOW." It doesn't really use that
25 capitalized term to refer to items. So, one of the arguments

1 right off the master contract, Your Honor, is, there's a
2 distinction between item don't use the word good and work and
3 services which is capitalized which is the entire intent of the
4 contract is for work performed.

5 Your Honor, then if you turn to Statement of Work
6 Number 1 which we've also included in the stipulation of facts,
7 if you look at the very first provision it says, "For the
8 supplier's performance of services." In this instance there is
9 a conflict between the two documents because services here is
10 used in the capital S, but later if you looked at the project
11 scope it says, "Service -- Circuit City wishes to engage in the
12 service as little as a supplier for the purposes described in
13 Section 3," and services is defined again.

14 Now, that would've been a big deal, but if you look
15 at the actual description of services in Section 3, it's a list
16 of bullet point. And it says, "The following are basically
17 services to review last date for changes, review requirements,
18 manage paper inventory." It doesn't say purchase paper, manage
19 it. Ensure. Reporting. Any possible printing needs.
20 Coordination. Coordination. Store ad distributer.

21 And then the deliverables are, "Ensure that there's
22 an adequate supply." It doesn't say provide an adequate
23 supply. Monitor printers. Help printers to achieve acceptable
24 quality standards. Help in monitoring a timely delivery.
25 Provide suggestions. It doesn't say sell goods. It doesn't

1 even say sell items.

2 So, under SOW 1, Your Honor, again, though there may
3 be a distinction about services, it's clear that these are all
4 service items. There's no real production as I can see yet of
5 items or goods to be delivered. I'd also note that every one
6 of these contracts does not have anything that say anything
7 that says this shall be governed by the UCC or subject to
8 interpretation of the UCC. There's nothing in there about that
9 and goods.

10 Your Honor, if you then turn to statement Number 2
11 which is also at issue, again, we get the witness, and then in
12 the third line there it says, "Terms and conditions for
13 suppliers' performance of services." Again, I go back to the
14 master agreement. This time it's not defined. That's the work
15 performed. It's not items delivered on behalf.

16 Then you look at the project scope. It does say that
17 the supplier will provide paper, print and logistical services,
18 but then if you go through the description of services, this
19 is -- both parties are providing it, but you look to the
20 supplier of services which start on Page D, "Supplier will
21 supply," the operative word there, "the specified paper, print,
22 or distribute in each event. It doesn't say they'll sell the
23 paper, the print and distribute it. It shall supply it.

24 And then it says, "Supplier warrants that the
25 work" -- it doesn't say that the items, the goods will be

1 performed. And, you know, it's the services. And there's
2 nothing that really warrants the items, the paper supposedly.
3 And if you look, then (g); "Supplier will be responsible for
4 any defective work." It doesn't say defective goods.

5 And if you look at the next one, "Will absorb the
6 cost of late insertion penalties." That's what their job was,
7 to get these things printed and give them to the newspapers,
8 "And the supplier agrees to satisfy the quality
9 specifications." Again, Your Honor, it doesn't look like
10 there's an item, a sale of goods in this contract.

11 Finally, if you go to Statement of Work 3, Your
12 Honor, it's essentially the same as Statement of Work 2. Big
13 capital S, Services. Go back to the master agreement. That's
14 for work. Project, scope, the supplier will provide, not
15 supply this time, paper, print, services in support of the
16 domestic advertising circulars. And when you look at
17 description of services again, (d) has, will supply the stuff.
18 Supplier warrants again the work, not the items. Supplier
19 shall be responsible for defective work, loss or damage to
20 inserts. Supplier will be responsible to absorb the late
21 insertion of penalties and agrees to satisfy.

22 So, Your Honor, our first argument will be on the
23 basis of the contracts themselves. These were intended and the
24 predominant purpose of these contracts was not the sale of
25 goods. There was no sale of goods here. It was the supply of

1 services with an incidental being that certain items, paper,
2 had to be used to perform the function.

3 Your Honor, the next part of this is the nature of
4 the business, and I think if you go to the stipulation of facts
5 as we point out, the advertising of theirs in the website, it
6 clearly provides that there's a printing company. The paper
7 is -- you know, the revenues are a billion dollars and they're
8 far exceeded by the services to be performed as opposed to the
9 actual sale of the paper products. So, we think the nature of
10 that business itself plus the nature of the business given to
11 us is to predominantly provide services.

12 Your Honor, and finally I think it's critical to even
13 think about this analysis. We paid for the paper. We bought
14 it. We paid for it. It's not a dispute here. It's not like
15 my plastic case where there was a -- something that we didn't
16 pay and the service like salt put on a road. We paid for the
17 paper. We gave it back. They printed on it. We took the
18 graphic arts. It was our graphic arts. We sent them a PDF.
19 They put it on a circular.

20 So, Your Honor, again -- and if you look at the cost
21 relative to the claim, most of the claim that is out there,
22 predominantly if not everything but a de minimis amount, is for
23 the services that they performed in getting these inserts to
24 the carriers to ultimately get to the newspapers.

25 And so, we think the intrinsic worth of the

1 "materials" here is de minimis, minimal and negligible, and
2 therefore based upon the predominant purpose test as followed
3 in this jurisdiction our view would be that this is simply not
4 a contract for the sale of goods as required by 503(b)(9), but
5 rather the predominant purpose is to provide services. The
6 services were basically to take our materials, the paper, take
7 our artwork and to put that artwork on the paper and get it
8 delivered to the newspaper.

9 Your Honor, with respect to the second argument is
10 simply that, well, okay, even if you were to assume these were
11 goods, and there's -- the cases that they cite to say, well,
12 look, certain types of materials when you do a print
13 advertising are goods. The key is the movability of this.
14 Let's take that argument. Well, then it has to be receipt by
15 the debtor. And our argument is simply that it is not receipt
16 by the debtor. 503(b)(9) requires that it be received by the
17 debtor within 20 days.

18 Now, the argument is shifted, I think, between our
19 supplemental reply to their reply to our reply a little bit.
20 Initially the argument was, clearly their view was when they
21 delivered it to the common carrier it was delivery to the
22 goods. The problem with that argument is every court seems to
23 reject, or most courts seem to reject the argument that when
24 you deliver to a common carrier that's our authorized
25 representative or agent. And for good reason, Your Honor.

1 The notion of agency, and I happened to pull out the
2 second jurisprudence of something on agency just to check my
3 recollection, it's not the case that any time a party enters
4 into a contract with a third party an agency relationship is
5 created, and there's a very good reason for that.

6 One of the definitive factors about an agency
7 agreement is that the person who acts as your agent acts on
8 behalf of you, not just simply for your benefit. Contracts
9 obviously are for your benefit. What has not been established
10 here is -- and if it's on behalf of you a fiduciary
11 relationship has to be established between you and your agent
12 so that if they're negligent, you're negligent. If they're
13 responsible for some act, you're responsible for your act.

14 Well, we do not dispute that there is a
15 transportation agreement. But, the transportation agreement
16 itself, again, these are in the documents, makes clear that the
17 common carrier was not our agent, it was simply a contract
18 party. Indeed it says in the contract, for example, there are,
19 and I'll just use the Elex logistics, Section 2, liability for
20 damage to cargo. Elex assumes the liability for actual loss or
21 injury to CCS's cargo. That's not an agency relationship.
22 It's a divvying up of responsibilities. They get paid a fee.
23 They take responsibility.

24 There is another section, 2.11, where the Elex agrees
25 that its sole expense and subject to any lawful limitations to

1 a defendant (indiscernible) CCS and to affiliates. So, it's
2 taking liability from us. And then on 4, in Section 4.1, it
3 says it's a common carrier. It's a motor carrier. In 4.2 it
4 says, "In the event of any shipment is refused by the receiver
5 or consignee, the motor carrier is otherwise unable to deliver
6 it. Liability for loss or damage under this section shall
7 continue until shipment has been properly placed at a public
8 warehouse."

9 So, they've assumed the liability. It's a contract.
10 It's not solely for the benefit of us. It's not on benefit of
11 us. The transportation common carrier is simply not a
12 fiduciary relationship and therefore could not be our agent.

13 Your Honor, and in this jurisdiction, I'll point this
14 out, and I have a case to cite to Your Honor. It's Carrie E.
15 Rainy and Robert W. Rainy v. Barnst Lumber (phonetic). It's
16 Supreme Court Appeals of Virginia (1954). But -- and that
17 supreme court case says the following. "Agency has been
18 defined as the relationship which results from the
19 manifestation of consent by one person to another that the
20 other shall act on his behalf and subject to his control." And
21 I cite that -- "and the agreement by the others to so act."
22 It's a restatement second agency, one of the reasons we pulled
23 it out for today. There is no presumption that agency exists.
24 And the Court goes on to say, "And the burden falls upon him
25 who alleges an agency to prove it."

1 So, Your Honor, we have -- first of all, we don't
2 think that there's been enough facts, even in a stipulation of
3 facts to show that the common carrier has an agency
4 relationship. And indeed, the contracts and an understanding
5 of what it is to act on behalf of as opposed to merely for the
6 benefit of which both parties gets benefits on contract is not
7 satisfied by the transportation agreement.

8 So, we would say Step 1, and I think it's almost
9 conceded by the reply to go to the newspaper, that there is no
10 agency agreement between us and the common carriers. That is
11 the predominant law. Now, let's take the newspaper carrier.
12 Your Honor, for exactly the same reasons, whether there's a
13 contract or not, there can be no facts, and there's none
14 certainly established, and it's given the burden I think they
15 fail as a matter of law, but there are no facts to show that
16 even the newspaper to which it was delivered is our agent.

17 The fact of the matter is, Your Honor, they can --
18 first of all, it's not a delivery, so you have to stretch the
19 language of 503(b)(9) as follows. You have to say deliver --
20 receipt by a debtor, actual possession of -- by the debtor can
21 be actual possession by an authorized representative, i.e., its
22 agent. So, you'd have to establish that that newspaper was the
23 agent. There's no contract that has been put into facts. But,
24 even if there was a contract this is a relationship of benefit.

25 We don't specify who at the newspaper inserts the

1 papers. You know, we do specify a date. We do specify the
2 terms that it is. We don't say you have to put it in between
3 Section C or D. We don't tell you various other things, how to
4 do it upside down, backwards or the other way, and importantly,
5 the newspaper still has liability if it fails to do so, and D,
6 even under the contracts of the transportation, the only
7 evidence it specifies that they could receive, but the
8 newspaper could even review that -- could refuse the delivery
9 of the insert and then the common carrier has a certain
10 responsibility. Our agent couldn't refuse that sort of
11 delivery, and indeed if it did so, our claim would not be for a
12 breach of agency against ourselves, it would be for a breach or
13 contract against the newspaper.

14 So, Your Honor, we'd say that, (1) no goods,
15 predominant purpose fails, (2) even if Your Honor was inclined
16 to say that there were somehow goods because there was a
17 moveable insert here which is about the strongest argument I
18 could come up with, it's not -- it has not been delivered to
19 the debtor because it's not been delivered to the debtor itself
20 or the debtor's agent, but a third party, and therefore there
21 can't be a 503(b)(9) claim.

22 THE COURT: All right. Two questions. Let's go to
23 the moveable insert comment. Why isn't the moveable insert a
24 specialty manufactured good as would be -- as that term would
25 be used to the UCC?

1 MR. GALARDI: A manufactured good. Because again,
2 Your Honor, what's a manufactured good? I make some --

3 THE COURT: If you ordered green widgets, you know,
4 and you say, well, they're delivered to me, but, you know, the
5 fact that they made them green, that's a service. You know,
6 what point do you parse this down and say --

7 MR. GALARDI: Well, take a widget. Now, I never knew
8 what a widget was, but here it's a gear.

9 THE COURT: I don't either, that's why I used --

10 MR. GALARDI: So, let's take a gear because it seemed
11 to be a lot like a gear. If I gave you a slab of steel and
12 said make it into a gear with the following, you know, ring
13 configuration, certain width, certain -- and you did that,
14 that's a good. To me that is a good and you're moving it.
15 It's the sale of a good.

16 What did we do here? We said manage paper. We'll
17 buy it. We'll give it to you. Said take our artistic work,
18 and there's all these provisions of -- put it on there. So, do
19 all that. Make sure you always have paper. Make sure you have
20 the artwork and the colors and the dyes and everything to do
21 this, and when we tell you to perform the service, i.e., put it
22 on this with these dates, that, do it and deliver it.

23 That to me is not doing anything of other than taking
24 all of our stuff and performing a service and putting it on.
25 It's not cutting it to specifications. There's not -- there's

1 probably a technical expertise as to how to get the printers to
2 do what they do, but that's managing the printers, monitoring
3 the printers, just as I read, controlling the printers --

4 THE COURT: What Circuit City wanted was the
5 circular. I mean, you know, you wanted to have that thing that
6 could go into the newspaper that could be distributed to your
7 customers.

8 MR. GALARDI: I agree with you. And then, therefore,
9 almost anything would be a thing under that circumstance. If I
10 gave you all the pieces and you put it all together are you
11 performing a service for me or are you actually making the
12 thing? It's hard --

13 THE COURT: No, this snow removal wouldn't be a -- it
14 wouldn't clearly be a service then. I mean, you know, we're
15 not selling salt. You know, we're providing a service.

16 MR. GALARDI: I'm glad you say that and I'd love to
17 have had the snow removal matter in front of you, Your Honor,
18 but others have disagreed.

19 THE COURT: I understand. but, you know, I guess we
20 have to figure out, you know, because in this case we actually
21 do have a thing. When we get to the end of the --

22 MR. GALARDI: At the end of the day you absolutely
23 have a thing.

24 THE COURT: And, you know, the question is, you know,
25 whether or not, you know, that falls within the definition of

1 goods as a specially manufactured good or whether it was your
2 thing all along and they just provided a service by coloring it
3 or --

4 MR. GALARDI: And I think -- here's another example
5 that I think I lost on it in Detroit, but I still to this day
6 don't -- take a watch, okay? I get a gear from here, I get a
7 face from here, I get all this. I get the bands, I get the --
8 all the gears. And I say, please put that together. That's
9 exactly what we have here.

10 Now, putting it together to me is not the
11 manufacturing of a thing. At the end of the day I have a
12 watch. And you may send me a watch or you may send it to a
13 third party, but that to me is performing a service. You have
14 an intellectual knowledge of how to put these pieces together.
15 I don't believe that that's the creation of a good for sale.

16 THE COURT: I used to represent a company that made
17 fire trucks --

18 MR. GALARDI: I knew I'd get myself in trouble.

19 THE COURT: -- and they would buy the engines from
20 this company and they'd buy the chassis from that company and
21 they'd buy the bodies from a third company and they'd take them
22 and they'd put them altogether. And really the only thing they
23 did was put them together and paint them red and --

24 MR. GALARDI: But, then did they sell you the trucks
25 or did they charge you for the services of doing the --

1 THE COURT: They sold trucks.

2 MR. GALARDI: Well, but that's different. They're
3 not selling the trucks. They're not selling the inserts to
4 anybody. They were selling me the services. If you're -- in
5 your exact example, or the watch person, they're not selling
6 you the watch. They sold me -- they basically said for a fee.
7 This is what they did. For a fee I'll take your artwork, I'll
8 take the paper that you bought, I'll put it together, fold it,
9 color it and make sure that the printers are all working, and
10 then I'll deliver it to somebody else.

11 They didn't make, you know, or manufacture a single
12 thing in that process. They did a service. They put things
13 together in the right order in the right way, and then they
14 delivered it. And so, it's not -- but they didn't deliver it
15 and say, okay, now at the end of the day I'll sell you the
16 circular.

17 There's not a sale or goods for the circular. It's
18 not like they said, let us do all this stuff and I'll sell you
19 a circular. If you like it you get it, if you don't like it,
20 right? You had to like it because we did the artwork. We
21 bought the paper. We did this.

22 I think your fire truck is different because it makes
23 all the difference in the world whether at the end of the day
24 I'm not going to buy a fire truck. So, let's assume you had a
25 cost overrun on the fire truck. You'd lose on that sale. This

1 is a little bit different. We're getting services now.
2 They took responsibility for certain things but it was still
3 the know how of how to put things together and make it work.
4 It wasn't that they manufactured something, took risks on that.
5 They didn't take a risk on my art, I don't like my artwork. If
6 they painted the fire truck red and white and blue, you didn't
7 have to buy it. That's different. There's an artistic element
8 or there's a sale of a good at the end of the day. That's not
9 what we have here. It didn't sell to the newspaper. It didn't
10 sell to me the insert. It wasn't on a per piece basis. It was
11 here's what we're charging you for the services and, yes, there
12 was an incidental cost with the paper which we paid for.

13 There was an incidental -- they didn't charge me for
14 the inks and all that. They charged me a fee for doing these
15 things and that's what this contract seems to provide to me if
16 you read through the services, the monitor, and that contract
17 distinguished between an item and work. I don't think your
18 fire truck company distinguished between the working and
19 putting together the ladder, the hooks, the hoses, and
20 everything else and selling you at the end of the day the fire
21 truck because you bought the fire truck.

22 So, you know, we sort of were talking about if I did
23 that with the car and I got a Midas muffler and I got this,
24 that, and the other thing and I had a Ford, and that was my
25 car, that's different if I just paid them for putting it

1 together. But if they sold me the Ford at the end of the day,
2 then I'd say it's a sale of goods and it's what did I pay for
3 at the end of the day? What I paid for at the end of the day
4 was for you to do these things that you specify in your
5 contracts as services, not the items. The items were
6 incidental.

7 THE COURT: So, it's sort of like the contractor
8 that's putting in windows in my house right now, is that, you
9 know, I bought the windows from the manufacturer and he's
10 putting the windows into my house. He's performing a service.
11 He's not selling me windows. That's what you're talking about?

12 MR. GALARDI: He's a general contractor and that's
13 how I've seen those services and the cases go to that. So,
14 I've had, you know, the cases that did the predominant purpose.
15 If I buy all the pieces for a well and somebody goes and fixes
16 my well, that's a service under the predominant purpose. Yeah,
17 you bought the parts. That to me is the same thing as the
18 person who goes out and buys a part to fix my watch. If he
19 goes out and fixes my watch, I'll certainly get charged for
20 that part but most of the charge is for the service and he's a
21 watch repairman. He's not a watch salesman. And, you know,
22 they may do that too. But what I'm getting is the service when
23 I bring it in and pick my watch up and there will be pieces
24 that they'll buy but that's not a sale of goods to me. It's
25 not like they're just selling that. They're doing the services

1 to put them in and make it work right and give me a warranty
2 for the work; not for the part but for the work. And I think
3 that's why I wanted to point out the warranty for work
4 exception.

5 THE COURT: All right. Now, the second question that
6 I had goes to your second argument about received and I
7 understand your agency argument completely. But my question is
8 can the entity that receives the goods be something less than
9 an agent or does it have to be the agent or the debtor in your
10 argument? In other words, could it be, instead of an agent, a
11 consignee, could it be a designated, you know, recipient? Can
12 it be something less than an agent?

13 MR. GALARDI: Well, I sort of started thinking about
14 what's the authorized representative language meaning for this
15 and can it be less than an agent of a fiduciary? Probably yes.
16 I haven't seen a circumstance. But can it simply be my
17 designee as a third party drop person? I don't think that
18 works if the third party designee is just simply a designee by
19 contract.

20 THE COURT: Well, if it was a customer, it certainly
21 would probably qualify, wouldn't it?

22 MR. GALARDI: I'm not sure that that's the case. We
23 sort of played around with that one this morning too. Why, if
24 I --

25 THE COURT: I wasn't privy to that.

1 MR. GALARDI: Because we were trying to figure out
2 how you would ask me that question. So, again, I think --
3 here's what I would have done and, again, we'll probably change
4 some law here, right? If the customer took it as my designee
5 and on -- you know, and the contract provided, for example,
6 I'll do this for you and I'll deliver it to third party but you
7 shall be deemed to have received it for that purpose? That's a
8 different situation in my contractual world.

9 Customers may be closer to that situation because I
10 may do it but it's not clear to me that this is on my behalf.
11 I can -- you know, I can mail order and send to somebody --
12 say, Mr. Fredericks. If I bought something and I had it
13 delivered to you, can you reclaim it from Mr. Fredericks? I
14 don't think so. Now, this is -- I go back to this is a
15 reclamation. I don't think you can reclaim it from Mr.
16 Fredericks. Now, he may have a claim against me for an
17 unsecured claim because he did everything I asked but I don't
18 think you can go to Mr. Fredericks' house under either the UCC
19 or bankruptcy law and say, okay, I delivered that t.v. Mr.
20 Galardi has now gone bankrupt, give me that t.v. back, and then
21 transport Mr. -- their unsecured claim to Mr. Fredericks. He's
22 got the t.v.

23 Now, I don't know if that's -- it's not -- I don't
24 have the legal theory but I don't think reclamation law works
25 like that and why? And I think it's -- well, I may have a

1 contract to sell Mr. Fredericks the t.v. but I sold him the
2 t.v., I got his money, I'm bankrupt now. He's the creditor
3 that's happy. This is the creditor that's not. And I don't
4 think it's -- and I think it's because, though I had a benefit,
5 again, it's not -- he might not have been my agent. He may
6 have been my designee recipient but I -- there's not sufficient
7 control and relationship in my view to say that merely because
8 I designate a third party to receive the goods, I think that's
9 what unfortunately a seller is going to have to be more
10 concerned about, but merely because I said you put it there or
11 there, like a common carrier delivers it to X or Y, that's not
12 a reclamation claim so I don't think it's a 503(b)(9) claim.

13 What more is required? There's various levels of
14 agency. As I read through the jurisprudence today, it's not
15 necessarily master servant but it's not merely contractual.
16 What it is between those places -- master, subservant, whatever
17 -- if that person has been authorized and I say, yes, this
18 person does it and then what my relationship and what can
19 happen once it's in Mr. Fredericks' possession or a third
20 party, seems to me to go closer to what that middle ground is.

21 What I know here, though, is there is no middle
22 ground or any facts to establish a middle ground. There is
23 nothing other -- I mean, there's not even facts to say, you
24 know, other than we'll admit we designate it to go, deliver it
25 to the third party, there's nothing other -- there's no

1 contractual relationship. There's nothing to say anything --
2 maybe there's an oral contract or representation. There's
3 nothing -- and, again, there's a shifting sands here to the
4 third party but there's nothing to say it's anything more than
5 a mere contractual relationship. And so I go back to the
6 common carrier.

7 Where there's -- you know, I don't know if there's
8 something more but when a common carrier who does things by
9 independent contract isn't liable in the first instance, then
10 just because you happened to deliver it to a third party, it
11 can't be that all of a sudden that happened. And had it
12 delivered to us in the 20 days? Yes, then there would be a
13 claim. But it didn't deliver it to us. So, it's like it was
14 delivered to the common carrier and since I know common carrier
15 laws and independent contractor, not my agent, I can't see how
16 a third party who is no more than a common carrier or is no
17 more than a contractual relationship, is the same as me.

18 Whether there's something else, if it was my
19 warehouse under common control of a third party, then that may
20 be closer to an agency agreement, though it may not be quite
21 the same daily warehouse receipt. I don't know. To my secured
22 creditor as collateral, maybe I can come up with another way to
23 think of that. In the instance where I had a joint venture in
24 Plastek with a JCI entity and we're building the cars together,
25 though it's not in my physical possession but we're doing

1 something in a joint venture and it's not technically a debtor,
2 maybe you get some facts there. But I just don't know -- I
3 know we didn't with the newspapers, and you can look at the
4 invoice and the newspapers -- you know, it's the Herald Times,
5 it's a bunch of Dallas newspapers. There's no joint venture.
6 There's nothing more than an agreement for them for which they
7 could be liable to go ahead and insert it. I didn't control
8 who inserted it. I didn't -- what shift it happened on, what
9 time, all of those things that makes this a pure, contractual
10 thou shalt insert, thou shalt mail by a certain day, that's it,
11 and everything else those newspapers control.

12 THE COURT: But they were certainly the designee that
13 you had for the receipt of this, if they were goods.

14 MR. GALARDI: Absolutely a designee but so was the
15 common carrier a designee. Right. And they knew it was the
16 designee. So, merely being a designee under the existing case
17 law can't be a sufficient condition for finding I had actual
18 possession. There's no facts that go beyond that with respect
19 to the newspaper, not that I was there. You know, did we have
20 Circuit City people at the newspaper to make sure that they
21 were neatly folded, put it in this way and hand it over, even
22 though I was, you know, not controlling who they used. We sort
23 of -- you know, there are circumstances. I can see where
24 somebody was more tightly inter -- you know, interconnected
25 with the recipient and made a better argument but there are no

1 facts here and, look, the common carrier contract is clear.
2 Give it to my common carrier. The case law is clear. When you
3 give it to a common carrier, that's not sufficient. So, unless
4 they can come up with something more, I don't think there's --
5 you know, the burden is with them under Virginia law. I don't
6 think there's a way to argue that this is somehow more than a
7 mere designee and it's not even, you know -- they were my
8 designee but it wasn't necessarily my designee to these service
9 providers. Right. Their designee was the common carrier.
10 They didn't know, go to the Dallas Times or the Herald or this
11 paper or that paper. That's not their issue. Theirs was
12 produce a quantity, give it to a common carrier, and be done
13 with it.

14 So, you know, they even have a further step removed
15 because, again, with the designee, I say here's my list of
16 carriers, or here's one of my carriers. All right. They can't
17 say, well, I knew you were giving it to him so they must have
18 been your agent. It's hard to make an agency argument when you
19 don't even know the ultimate newspaper to which the inserts
20 were going.

21 THE COURT: All right. Thank you, Mr. Galardi.

22 MR. GALARDI: Thank you.

23 MR. REPCZYNSKI: Your Honor, Tom Repczynski on behalf
24 of Graphic. Unless the Court has an objection, I'd actually
25 like to start with the second issue first that we were just

1 talking about and move back to the goods.

2 THE COURT: You may proceed as you prefer.

3 MR. REPCZYNSKI: First of all, I agree with Mr.
4 Galardi's having set out the test that applies. There's no
5 question here. The Court in this very case has ruled that the
6 predominant purpose test applies, that the UCC applies, and
7 that the two issues that we have here before the Court today
8 are both as to whether or not we are dealing with goods and
9 whether or not those goods were received.

10 With regard then to received and backing up to what
11 it was that was actually received, the Court has, I think, by
12 virtue of the questioning of Mr. Galardi, recognized what we
13 set forth in our papers with regard to the UCC's defining for
14 us here what, in fact, means received. Mr. Galardi does --
15 talks about it in his brief but didn't touch on it here in the
16 discussion so I'll focus the discussion on Section 8.2-705. At
17 least that's the UCC as enacted in Virginia so UCC Section
18 2-705, where the court -- where the UCC deals with, for
19 purposes of goods and delivery, the question of when are goods
20 received. And so, as is pointed out by Mr. Galardi in the
21 papers, there's a question here for purposes of this section,
22 what about goods in transit. Right. That's what we're
23 focusing on, are goods in transit and we have to decide
24 relative rights. But the relative rights under this section,
25 and I'm looking specifically now at Section 2, as between the

1 buyer and the seller of these goods, the question is whether or
2 not the seller may stop delivery and up until what point. And
3 it says, "(a) receipt of the goods by the buyer". In this
4 case, I don't think there's any question that the buyer of
5 whether or not goods or services, as they might be, but the
6 buyer here is Circuit City. So, when is Circuit City deemed to
7 have received the goods? That's obviously -- the question is,
8 did Circuit City receive the goods?

9 The answer must necessarily be yes because the UCC in
10 Comment (2) to this section, in official Comment (2) to this
11 section, helps us by saying, well, what is meant by this
12 Section 2(a) and, in Comment (2), it deals specifically with
13 receipt by the buyer, and that's what we're dealing with here.
14 When has the buyer received it? And, so, in the definition, it
15 says, "includes receipt by the buyer's designated
16 representative", in this case referred to as the sub-purchaser,
17 "when shipment is made direct to him and the buyer himself
18 never receives the goods."

19 So, when we talk about actual receipt, actual receipt
20 here is specifically contemplated to be actual receipt by one
21 designated by the buyer to be the recipient of the goods
22 purchased whereas here, and I believe I heard Mr. Galardi
23 concede that the actual designee was, in fact, the newspapers,
24 but sought somehow to challenge whether or not my client,
25 Graphic, could rely on the fact that they were only the

1 designee by virtue of a contractual arrangement with the common
2 carrier transporter, Elites Transportation. There is nothing
3 in the UCC or in 503(b)(9) that would put us anywhere near
4 there but rather instead, in line with where the Court's
5 questioning brought Mr. Galardi, does it have to be a level of
6 agency? No. Quite clearly, it's defined right here as saying
7 the buyer's designated representative. Is this a designated
8 representative? Well, yes.

9 Looking at the transportation agreement that was
10 signed with the Elites, we see in Section 2.2 that language
11 used by -- not Graphic because it wasn't a party to this
12 contract, but language used by Circuit City with its carrier,
13 in Section 2.2 referring to the carrier's responsibilities,
14 directs the carrier with reasonable dispatch to deliver each
15 shipment in good order and condition to the designated
16 receivers. That's Circuit City's language. It actually was
17 using language similar to what we see in the UCC to designate
18 the receivers of these goods.

19 THE COURT: Now, let's draw down on that just a
20 little bit before we leave it because I think this is
21 important. I have said in the previous opinion, I talked about
22 the word received in Section 503(b)(9) and what it means and I
23 relied on the UCC's definition of the word receipt because
24 received is not defined in the Code. It's not defined in the
25 UCC either but receipt was sort of close enough.

1 Now, we've got another phrase though we're looking at
2 here which is receipt by the -- by the seller -- no, receipt by
3 the buyer. And in the UCC -- I mean, in the 503(b)(9), it's
4 received by the debtor. And, of course, debtor is going to be
5 a defined term. Does that mean I can't use this definition or
6 is that definition broad enough to allow me to be able to
7 construe it the way you're telling me I need to construe it?

8 MR. REPCZYNSKI: It's necessarily broad enough, Your
9 Honor, because the reason it is set out here in commenting on
10 Section 2-705 of the UCC, is to give us the definition of that
11 actual receipt. If we have to make decisions under the UCC as
12 to what we do -- what rights belong to the seller, what rights
13 belong to the buyer, we have to determine whether or not a
14 buyer has received goods. Under 2-705, it says, well, what
15 about the realities that we face when we're in a common carrier
16 potential situation and we're going to face delivery of those
17 goods. What rights exist as between buyer and seller?
18 Interestingly, Your Honor, 2-705, Section 1, it sets forth at
19 the very end of that section, why we need to have these rights.

20 If the Court looks to the last line, if for any other
21 reason or -- if for any other reason the seller has a right to
22 withhold or reclaim the goods, this section, Section 2-705,
23 Section 1, is establishing why we need, under the UCC, to even
24 have this definition, why we need to understand do we have
25 receipt for UCC purposes by the buyer? In this case, it's

1 Circuit City, the debtor in this case. So, the two are equated
2 for purposes of a UCC analysis.

3 If the Court hadn't already determined and the
4 parties hadn't already agreed that the definition of goods and
5 the definition of received as applied under the UCC were
6 relevant, then I would say, well, perhaps not. Perhaps,
7 looking to 503(b)(9), and we're talking about the use of
8 receipt by the debtor, we might look somewhere else. But where
9 we are forced to look to the UCC to know what goods means and
10 what received means, to find what received means in the
11 purposes of did Circuit City receive them, here's where we have
12 our answer. Circuit City received them by definition because,
13 as the buyer, once they were received by the buyer's designated
14 representative, as here, the newspapers, which are acknowledged
15 in the last paragraph of our stipulated facts to have received
16 them, so there's no additional facts the Court would need to
17 see to establish whether or not that were the case, and in the
18 agreement itself, those newspapers were the designated parties
19 by the buyer. We have receipt. We have actual receipt by the
20 debtor as defined by the UCC.

21 So, the question now then is, the goods. As the
22 Court has pointed out, they are goods. They are items. They
23 are specially manufactured items. And looking to the Court's
24 prior decision on September 22, all things including specially
25 manufactured goods which are movable at the time of

1 identification to the contract for sale would apply under the
2 definition of goods. So, we've met that first part.

3 Are they manufactured goods? Mr. Galardi hesitated,
4 was unwilling to go there, and eventually got around to
5 distinguishing between why they are not actually goods created.
6 He referred -- nice, but not entirely accurate with the facts.
7 He referred several times, I caught the phrase, we bought the
8 paper and then we gave it back. That's not what happened here.
9 My client, Graphic Communications, is a paper company, Your
10 Honor. Its parent company, Unisource, is a paper company.
11 Incidental to what it did here was it gave the printing
12 services along with it in order to provide what it was asked to
13 provide, newspaper inserts. All of these contracts, as the
14 Court points out, were designed for purposes of creating
15 inserts under a program, a lengthy program. It went on for at
16 least the better part of a year. We see a schedule of what was
17 to be produced when and the notion of the paper being
18 incidental to what was actually received, as set forth in my
19 papers, Your Honor, the paper, the incidental paper, was over
20 -- cost over \$900,000 towards this project. The \$175,000
21 otherwise primary purpose as it were, \$175,000 is what it cost.
22 But once they had the paper, decided what paper was needed to
23 accomplish what Circuit City needed, it then took that paper
24 and did the printing of incidentally what it was provided by
25 Circuit City, saying, here, this is what we want put on our

1 paper to sell, to get out there, as newspaper inserts and then
2 delivered to the other parties. They're right --

3 THE COURT: That's a pretty big fact that we have in
4 contest here. Is this included in the stipulation anywhere,
5 the joint stipulation, as far as that is concerned?

6 MR. REPCZYNSKI: It is, Your Honor. The stipulation
7 -- the stipulation talks about the separate contracts, the
8 separate contracts for paper having been paid for, and you'll
9 see -- well, frankly, Mr. Galardi conceded it but, if you look
10 to Paragraph 39 of the stipulation, you'll see the exhibits K
11 and L referenced there, "true and correct copies of the
12 invoices and proof of payment are attached hereto as Exhibits K
13 and L." These are among the documents, Your Honor, that the
14 Court has agreed to put under seal but the amounts from those
15 contracts, the totals, are set forth in our papers, Your Honor,
16 where there were three separate invoices for paper, more than
17 400,000, more than 300,000 and more than another 100,000, for a
18 total of over \$900,000 worth of paper as part of what newspaper
19 inserts that were being purchased pursuant to this program with
20 the incidental costs being the cost of printing, storing,
21 moving, bundling. These issues that we see about the cost,
22 they would have the incidental costs being, I think it's 1600
23 or so dollars that appear on the actual invoices in question
24 here, those bundling costs, if you will, the twine if they were
25 actually bundled by twine. I doubt it, but the incidental

1 nature when taken through that view, taken through that prism,
2 clearly the bundling were the charges that are incidental to
3 that invoice. But that invoice is only one part of the project
4 which they refer to and recognize as a program of providing
5 news -- they don't like the work providing so I can't say that
6 they agreed to use the word provide -- but of providing
7 newspaper inserts for this particular date and this particular
8 -- I don't know what they call it -- program I know appears in
9 at least one location so --

10 THE COURT: Okay. But what you're saying is that the
11 -- under the master services agreement, that you were selling
12 the paper as well?

13 MR. REPCZYNSKI: Absolutely, Your Honor, and there's
14 no question, except that under the master services agreement,
15 you have then separate soughs as they refer to as one, two, and
16 three. So, the master services agreement sets out the
17 relationship of the parties. Then there are separate soughs
18 that deal with what it is that the different -- that Graphics
19 is going to provide. I can't take issue with the fact that SOW
20 number one reads the way that it does. SOW number one is this
21 overriding, look, they outsourced their paper needs. They're
22 not a paper company. We're a paper company. So, someone had
23 to manage their needs with regard to having newspaper inserts
24 available to them on the weekly program that they wanted them
25 to be delivered. So, we will out-source the management of that

1 program to you and make sure you got everything you need for
2 the incidentals associated with doing that. When the time
3 comes, we don't want you to provide the service of graphic arts
4 and everything else. We don't need that. We're going to give
5 it to you. That's ours. We'll do that for you. So, we're not
6 engaging you for advertising services or the development of a
7 flyer that we might like, like an advertising firm might be
8 hired to do. No. We want newspaper inserts and we've decided
9 that you, Graphic, are the company to do it for us at the right
10 price, the goods that we want to be put in those papers. So,
11 that's what ends up happening. Under SOW one, we define better
12 under the MSA. Under SOW one, we turn around and say, okay,
13 what is it that you're going to manage and coordinate and
14 oversee. But, when we get to SOW number two and SOW number
15 three, we get to here's what we want. Here's the product.
16 Here's the goods, the inserts that we need, and they are set
17 forth.

18 We talked about -- or Mr. Galardi talked about the
19 language that appears in the Statement of Work. Looking now at
20 Number 2, under Section 3(d), yes, it is description of
21 services but it's talking about supplying the specified paper,
22 print, and then distribute to each event. Well, as the facts
23 set forth and as Mr. Galardi said, although distribute is
24 included here, distribute was distribute to the printing
25 services, the printing areas, where these flyers were to be

1 printed, not distribute them, the flyers, across the country
2 because, as Mr. Galardi points out, that was handled by Elites
3 and that was handled according to the terms that they had
4 established as to where those were going to be delivered.

5 So, what do we have here? We have a focus on what
6 the supplier maintained responsibility for. Work, yes. That's
7 what Mr. Galardi repeated several times. But if you look at
8 Section 3(g), "Supplier shall be responsible not just for any
9 defective work but loss or damage to inserts." The work is
10 incidental to the creation of these inserts and it's getting
11 those inserts from here into newspapers and, more importantly,
12 into the homes of the people who read those newspapers, that
13 ultimately is what Circuit City needed to have happen. So, who
14 was liable if those inserts didn't make it there? The supplier
15 in this sense but not a supplier of services; a supplier of
16 inserts.

17 We talk about replacing the inserts under that same
18 Section 3(g) and then again under the Statement of Work, Number
19 3 we use exactly the same language. And it changes. He noted
20 that it changes from provide inserts to supply inserts. I
21 don't think it matters. I'm not sure he thinks it matters
22 either but it showed that they weren't precise necessarily in
23 choosing one word or the other here because what they did was
24 they defined both deliverables and services.

25 Focusing then on the deliverables aspect of what that

1 means under the contract between the parties, Mr. Galardi would
2 have the Court gloss over the fact that there was, in fact,
3 deliverables involved here, not just services provided. But
4 the services are necessarily -- my reading of it and I hope the
5 Court's as well -- but pointing you then to the definition
6 section in the MSA with regard to the difference between
7 deliverables being defined and services being defined, supply
8 or deliverables are any items or work prepared. Okay. Items
9 or work. Prepared. You prepare work. You prepare an item.
10 You prepare a work. I believe those two words are being used
11 here interchangeably to suggest that we have something that we
12 are producing and we are preparing it and providing it
13 ultimately.

14 What is services? Any reasonable effort expended by
15 the parties or their personnel to perform that work, meaning to
16 create that thing. To suggest that they're not providing
17 service incidental to what they did would belie the fact that
18 there are necessarily service involved in the creation of these
19 goods. But the Court recognizes the description of those
20 services just as well or better than I could set them out. To
21 make -- to go from plain paper to a newspaper insert in the
22 newspaper that you or I pick up on the stand, some service had
23 to be provided somewhere along the way. But that's what
24 Circuit City was asking for here. It's true; they hired my
25 client to oversee the whole project for them. But then, when

1 they had their individual Statements of Work -- Attachment A to
2 these individuals Statements of Work, Your Honor, set out very
3 specific pricing and the pricing is all inclusive. The number
4 that it says per sheet, if you will, or per copy, or whatever
5 term they choose, it is not merely the price that is included
6 on the invoices in question here. It's not that we see prices
7 on Attachment A and we multiply that by the number of prints
8 and we get only the printing cost. The prices that we see on
9 Attachment A as to Statement of Work Number 2 and Statement of
10 Work Number 3, is the pricing that included the 900,000 plus
11 that they paid for in the separate invoices for the paper and
12 the 175,000 or so that is at issue here with regard to the
13 printing services. But with regard to Attachment A on these,
14 it doesn't break out the paper cost versus the printing cost.
15 It talks about what's the cost going to be for you to run so
16 many newspaper inserts for us and the fact then that they were
17 separately invoiced for the paper is not definitive at all in
18 terms of what the costs of the newspaper inserts was. And
19 that, I believe, is edified by what you see in Section 6 of the
20 Statements of Work where it talks about fees in terms of
21 engagement. It talks about pricing for the product in both
22 Statement of Work Number 2 and Number 3. It said, pricing as
23 listed includes --

24 THE COURT: I'm sorry. Where are you pointing me
25 now?

1 MR. REPCZYNSKI: Sorry, Your Honor. In both
2 Statement of Work Number 2 and Statement of Work Number 3.

3 THE COURT: Okay. I'm in the Statement of Work.
4 Okay.

5 MR. REPCZYNSKI: It talks about pricing for the
6 product contemplated herein. And the product --

7 THE COURT: Which paragraph am I looking at?

8 MR. REPCZYNSKI: Section 6, Page 3 of 3.

9 THE COURT: All right.

10 MR. REPCZYNSKI: The product contemplated, Your
11 Honor, the good -- if a product isn't a good, I'm not sure what
12 else it could be. But the product is said here to include
13 what? It doesn't use the term now incidentals but it's saying
14 we have a product and it includes charges for these services.
15 These services are necessarily incidental to the overall cost
16 of the project, the fact that you have 900,000 plus worth of
17 charges that were separately paid for and acknowledged in the
18 stipulation under separate invoices K and L, does not mean that
19 you get to exclude those for purposes of determining under the
20 test, the predominant purpose test, what is incidental to the
21 project. It's not incidental to the printing. It's incidental
22 to the cost of the product as defined here and that product is
23 the newspaper inserts.

24 Unless the Court has any further questions for me,
25 Your Honor, that states our opinion, our position.

1 THE COURT: Thank you very much.

2 MR. GALARDI: Your Honor, let me start with the first
3 question you asked, Your Honor. You asked 503(b)(9) and the
4 relationship to 2-705. I do not think Your Honor is -- the
5 words in the statute 503(b)(9) are received by the debtor.
6 Admittedly, there's Comment (2) to the UCC 2-705. I don't
7 think there's anything that requires Your Honor to say buyer or
8 its designated representative and then read that back into
9 503(b)(9) debtor or its representative.

10 The reason I say that is two; one is the words aren't
11 there and, two, it is an administrative claim. Administrative
12 claims can be construed narrowly and therefore to broaden it to
13 include words, you have a good argument under the general law
14 about administrative claims that, you know, Congress could have
15 said that. They didn't say that. So, therefore, it's not and
16 its representatives. Again --

17 THE COURT: It could have said to or on behalf of the
18 debtor.

19 MR. GALARDI: To or on behalf of the debtor and done.
20 And also, if you look at the lead in to that, it's the value of
21 the goods received by the debtor, and so I think it's not the
22 value of the goods received by the debtor or its representative
23 because the value received by its representative might not have
24 been property of the estate. So, I think there are good
25 arguments. Again, we sort of -- there is no legislative

1 history to what Congress was thinking here. I'm sure it never
2 thought of all or any of these things so it really comes down
3 to what Your Honor is essentially comfortable with given your
4 prior rulings.

5 We relied on the UCC for the word receipt. There's a
6 different word. It's received. The question is, okay, do I
7 use bankruptcy law to interpret now? Do I add those words or
8 not? But there's no absolute reason that you have to rely on
9 comment -- to 2-705 on that matter.

10 Your Honor, just so that it's clear where the
11 comments about this paper issue, which I actually think is a
12 distinction without a difference, but if you look at exactly to
13 Section 6 that they're speaking -- that he was speaking about
14 in, I guess, it's Exhibit I which is the SOW filed under seal,
15 it says, "Pricing for the product contemplated herein is as
16 specified in the attachment. Pricing is listed and includes
17 all vendor charges related to supplying and storing paper."
18 They stored our paper so that's -- and if you look at the
19 attachment, we bought that paper. There's no dispute we bought
20 the paper. We paid for the paper. That's not what they're
21 seeking money for. What sounded like there was a little bit of
22 a question is whether we gave them back that paper or whether
23 they had it there and they were printing it. But we bought the
24 paper. They had to store it for us. We didn't just buy all
25 the paper and then ship it back. That would have -- this is

1 the cost. And, indeed, if you look at Exhibit --

2 THE COURT: Well, Mr. Repczynski says that you bought
3 the paper pursuant to the Master Service Agreement.

4 MR. GALARDI: Well, we bought the paper, paid for the
5 paper separately invoiced. It was our paper. Then we gave it
6 to them to do Statement of Work 1, 2, and 3.

7 THE COURT: Well, going back to my contractor
8 example, I might pay separately for the windows and pay
9 separately for the work the contractor performed for the
10 windows because it's all part of one contract. But --

11 MR. GALARDI: As a master agreement, you're right.
12 You contract with your contractor.

13 THE COURT: So for the predominant purpose test,
14 don't I have to look at the master agreement rather than break
15 out the different parts and just say what was the overall
16 intent of this agreement? Was it to supply services --

17 MR. GALARDI: Well, yes, and --

18 THE COURT: -- or was it to supply goods? And then,
19 if I find out under the whole contract that it was one or the
20 other, then I say, okay, now I'm not going to parse it. I'm
21 not going to just add up the goods. I'm not going to -- you
22 know, if the overall purpose was to supply an item, then it
23 satisfies the definition.

24 MR. GALARDI: Okay. And I'll do it a little bit
25 backwards but I think generally yes. The master agreement is

1 like -- you know, think about leases which I'm more familiar
2 with, where you have equipment leases. You have your master
3 agreement and then you have your leases. It's not the master
4 agreement. That's, like, common terms. As you look at the
5 SOWs and then those are incorporated SOWs so I would go, look
6 at the SOWs, determine what each particular SOW, the
7 predominant purpose is, and understand that the master
8 agreement are common terms. And you'll buy the paper for that.
9 You'll buy the goods. But look at what you're doing under the
10 SOWs to determine, not look at the master agreement and then
11 say these other things follow. That may be a distinction
12 without a difference but I think it's very important here
13 because I'm focusing on what each SOW for which they are
14 seeking compensation sought.

15 THE COURT: Okay. And which SOWs are you saying
16 they're not entitled to for payment and which SOWs do you say
17 they are entitled to?

18 MR. GALARDI: I don't think under any of them. I
19 think all --

20 THE COURT: All right. So, what's the distinction?

21 MR. GALARDI: Well, the distinction is if you were to
22 -- again, what concerns me is if you looked at the master
23 agreement, it says, "Thou shalt buy paper and services." You
24 might not be able to come up with a predominant purpose.
25 What's better defined is when you look at the SOWs and it says,

1 yeah, I agreed to buy paper and products but here what I'm
2 doing predominantly is buying your services.

3 Now -- and let me also just point out one other fact,
4 just so that I can get some facts out. If you look at Exhibit
5 J, the last page, there is a -- the 2008 master insert
6 schedule. There's a line that says, "Paper" and it says,
7 "30 number newsprint, supplied by Circuit City."

8 MR. REPCZYNSKI: I'm sorry. Where were you looking?

9 MR. GALARDI: Exhibit J, I think it's SOW-3, last
10 page, which is an attachment that you were pointing out.

11 MR. REPCZYNSKI: Thank you.

12 MR. GALARDI: And it's "Paper, No. 30 newsprint,
13 supplied by Circuit City, Brian Hargrove." So, again, I'm not
14 wedded to the idea that who supplied the paper. It's whose
15 paper was it. We had title to the paper, whether it was in
16 their possession or not and we say it was incidental. We paid
17 for it and we're really still talking about are you being
18 compensated for the service part. That question, to me, goes
19 to well, was the SOW with the terms and conditions of the
20 master agreement embodied into it, was that predominantly a
21 service contract or was it predominantly a purchase of goods
22 contract. And our argument is, with respect to each of those,
23 it's predominantly the services. And if you read them, the
24 predominant purposes were the services and that's why I went
25 through the bullet points and the deliveries.

1 I'm not disputing that there was an item delivered at
2 the end of the day. I'm just saying that's not what we
3 purchased. If somebody went up to Circuit City and said, well,
4 what are you getting from these people, we're getting the
5 services. We're getting -- you know, yeah, but I'm not buying
6 at the end of the day. There's no purchase price here that
7 says thou shalt buy the insert for X dollars per insert.
8 That's not here. That's a goods contract to me and that's what
9 we don't have here. What you're buying here is the services.

10 So, really, two arguments on the debtor. It has to
11 be received by the debtor so Your Honor can stop that and say,
12 look, I'm going to read narrowly under 503(b) law that says the
13 debtor. If Congress wanted to go debtor or its designated
14 person, it could have done so. It didn't so therefore we're
15 done. That's illegal.

16 If you want to say you go broader, I think then you
17 can look at the UCC law that says merely because you deliver it
18 to a common carrier, that's not sufficient, it is a designated
19 -- sometimes it's designated and sometimes it's not. There's
20 nothing in this contract that says thou shalt deliver to X.
21 It's a separate contract that somebody happened to come back
22 and pick up these goods. Okay. It's not a designated in their
23 contract to deliver it and they admit that so I don't think
24 it's the designated. It's a common carrier to deliver and
25 again we think, again consistent with 503(b) law, consistent

1 with the case law that says common carrier is not a designee,
2 that neither the newspaper nor the common -- just by being the
3 contract party that happens to pick the goods up by a separate
4 third party contract with Circuit City or happens to have it
5 delivered to them as a separate contract with Circuit City,
6 that's not a designated representative from their perspective
7 and therefore it doesn't complete the UCC -- the UCC analysis,
8 even if you wanted to go beyond the words by the debtor.

9 I don't know if you have any other questions for me,
10 Your Honor.

11 THE COURT: I don't but your counsel has.

12 MR. GALARDI: He wants to correct me on something,
13 I'm sure.

14 (Pause)

15 MR. GALARDI: Again, I think we pointed it out, Your
16 Honor, but on the invoices for which they're seeking
17 compensation, even though the dollar amount of total paper cost
18 was significant, they're not on the invoices for which they're
19 seeking payment and they're not -- those have been paid. So,
20 again, I go to the distinction between goods and services.
21 There may have been a goods contract with its parent or anybody
22 to buy it. It was to store it and this is for what I think
23 these SOWs are, to take that paper which they had supplied by
24 the master agreement but which is incidental to this and to put
25 the services together -- put the leaflets together. Thank you.

1 THE COURT: All right. Thank you. Anything further,
2 Mr. Repczynski?

3 MR. REPCZYNSKI: Not unless the Court has any
4 question for me, Your Honor.

5 THE COURT: Okay. All right. The Court has before
6 it the debtor's objection to Claim No. 1053 of Graphic
7 Communication Holdings, Inc. and under Section 503(b)(3) of the
8 Bankruptcy Code. The Court understands the requirement to
9 construe administrative claims narrowly. The Court has
10 previously ruled that the predominant purpose test will be
11 applied to contracts for goods and services and in determining
12 whether the items provided were goods or were they services,
13 in this case, advertising circulars that were provided by
14 Graphic.

15 The Court, in construing the predominant purpose
16 test, thinks you have to look at the contract between the
17 parties and take a holistic approach to it about what it was,
18 whether or not the delivery of specific items was the purpose,
19 or whether the -- rather the predominant purpose was the
20 delivery of services. In this case, I think that it's a very,
21 very close case, as both counsel know, with regard to the goods
22 issue and the Court finds that the newspaper circulars were in
23 the nature of special manufactured goods. They were a movable
24 item as defined in the UCC and as the Court has previously
25 adopted the definition of goods. And the Court finds that the

1 newspaper circulars -- that the overall predominant purpose of
2 this contract was the delivery of the quote "deliverables" or
3 the advertising inserts. So, the Court finds that the
4 predominant purpose of the contract was for the delivery of
5 goods and so it meets the definition in Section 503(b)(9).

6 The next question is whether or not these goods were
7 received by the debtor. Again, the Court is going to defer to
8 the definition of goods of receipt once again in the UCC, and
9 especially Comment (2) to Section 8.2-107 which provides that
10 --

11 MR. REPCZYNSKI: Clarify, Your Honor?

12 THE COURT: I'm sorry. Seven oh -- I'm sorry.

13 MR. REPCZYNSKI: The 8.2 is actually the Virginia
14 codification with the 2-7.

15 THE COURT: 2-7. But this contract says specifically
16 it's to be construed under Virginia law.

17 MR. REPCZYNSKI: Yes.

18 THE COURT: So wouldn't I have to construe it under
19 the Virginia version of the UCC?

20 MR. REPCZYNSKI: That is our position.

21 THE COURT: Okay. Well, that, again, is another
22 finding the Court will make, is that it was to be construed and
23 so the Court has to rely on Virginia UCC and that it provides
24 receipt of the goods by the buyer. It can be the designee of
25 the buyer and the Court finds that the newspapers in this case

1 was the designee of Circuit City in this case.

2 So, the Court is going to overrule the objection to
3 the claim in this case on those grounds and the claim will be
4 allowed as a 503(b)(9) claim. The Court doesn't have to then
5 look at the various invoices under the contract to see if this
6 particular invoice was for the service part or the goods part.
7 I think that once the Court has established that the overall
8 contract is predominantly for the delivery of the goods, as
9 this Court has found, that then all of the items are then
10 included within the contract and are included within the
11 definition of 503(b)(9) and so be allowed as an administrative
12 claim.

13 Mr. Repczynski, I would ask you please to prepare
14 appropriate findings and conclusions to that effect in a form
15 order for the Court to review. It is not my intention to write
16 a memorandum opinion in this case unless the debtor wants to
17 appeal. If you do decide to appeal the Court's decision, just
18 let my chambers know and then I will prepare a formal
19 memorandum opinion in the case.

20 Any questions regarding the Court's ruling on this?

21 MR. REPCZYNSKI: Thank you, Your Honor.

22 MR. GALARDI: No, Your Honor.

23 THE COURT: Thank you both for your very capable
24 arguments.

25 MR. FOLEY: Your Honor, that concludes the matters on

1 the agenda other than the chambers conference that you asked
2 for.

3 * * * * *

4 C E R T I F I C A T I O N

5 We, KATHLEEN BETZ and CECILIA ASHBOCK, court approved
6 transcribers, certify that the foregoing is a correct
7 transcript from the official electronic sound recording of the
8 proceedings in the above-entitled matter, and to the best of
9 our ability.

10

11 /s/ Kathleen Betz

12 KATHLEEN BETZ

13

14

15

16 /s/ Cecilia Ashbock DATE: July 27, 2010

17 CECILIA ASHBOCK

18 J&J COURT TRANSCRIBERS, INC.

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